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11  
12 **UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF ARIZONA**

14 Anne Pogue,

15 Plaintiff,

16 v.

17 The Prudential Insurance Company of America;  
18 Valitas Health Services, Inc.; Valitas Health  
19 Services, Inc. Employee Term Life, Accidental  
20 Death and Dismemberment and Dependents  
21 Term Life Coverage Plan,

22 Defendants.

Case No.

**COMPLAINT**

23 Plaintiff, Anne Pogue (hereinafter referred to as “Ms. Pogue”), by and through her  
24 attorney, Scott E. Davis, and complaining against the Defendants, she states:

25 ***Jurisdiction***

26 1. Jurisdiction of the court is based upon the Employee Retirement Income  
Security Act of 1974 (ERISA); and in particular, 29 U.S.C. §§ 1132(e)(1) and 1132(f). Those  
provisions give the district courts jurisdiction to hear civil actions brought to recover  
employee benefits. In addition, this action may be brought before this Court pursuant to 28

1 U.S.C. § 1331, which gives the Court jurisdiction over actions that arise under the laws of the  
2 United States.

3 *Parties*

4 2. At all times relevant to this action, Ms. Pogue was a resident of Yavapai  
5 County, Arizona.

6 3. Upon information and belief, Defendant Valitas Health Services, Inc., a  
7 Tennessee corporation (hereinafter referred to as the “Company”), sponsored, administered  
8 and purchased a group life insurance Policy (hereinafter referred to as the “Policy”), which  
9 was issued to the Company in the State of Tennessee, and the Policy is fully insured by  
10 Defendant The Prudential Insurance Company of America (hereinafter referred to as  
11 “Prudential”).

12 4. The specific Prudential group life insurance Policy is known as Group Policy  
13 No. G-43768 (*See* Exhibit “A”). The Company’s purpose in purchasing the Policy was to  
14 provide life insurance coverage and welfare benefits for its employees.

15 5. Through the group life insurance Policy, Ms. Pogue was afforded life  
16 insurance coverage for herself and her family/dependents, and the Policy contained a  
17 feature which waived any premiums that may have been due on the Policy (hereinafter  
18 referred to as the “Life Insurance Waiver of Premium benefit”) if Ms. Pogue was found to  
19 meet the definition of “Totally Disabled” in the Policy, as is more specifically pled and  
20 explained in detail *infra*.

21 6. Upon information and belief, the Policy may have been included in and part  
22 of an employee benefit plan, specifically named the Valitas Health Services, Inc. Employee  
23 Term Life, Accidental Death and Dismemberment and Dependents Term Life Coverage  
24 Plan (hereinafter referred to as the “Plan”). The Plan may have been created to provide the  
25 Company’s employees with welfare benefits.



1           16. In this action, Ms. Pogue seeks the reinstatement and continuation of the group  
2 life insurance coverage for herself and her family/dependents, as well as the Life Insurance  
3 Waiver of Premium benefit from the Plan under the relevant Policy pursuant to § 502(a)(1)(B)  
4 of ERISA, 29 U.S.C. §1132(a)(1)(B).

5           17. In this action, Ms. Pogue also seeks any other employee benefits she may be  
6 entitled to from the Plan and/or from the Company as a result of being found disabled in this  
7 action and her benefits being reinstated.

8           18. After being a loyal employee and working for the Company in the occupation  
9 of a Mental Health Technician, Ms. Pogue became disabled from working in that occupation  
10 and also disabled from working in any occupation on or about December 6, 2014.

11           19. Ms. Pogue filed a claim for long-term disability benefits made under a group  
12 long-term disability Policy that was also issued, fully insured and administered by Prudential.

13           20. Prudential approved Ms. Pogue's long-term disability claim and has found her  
14 disabled and paid her long-term disability benefits from June 6, 2015 through the present date.

15           21. In Ms. Pogue's long-term disability claim, Prudential previously found that due  
16 to her disabling medical conditions, through the date of filing this Complaint, Ms. Pogue has  
17 remained continuously disabled from working in any occupation since December 6, 2014.

18           22. Ms. Pogue asserts that Prudential's approval and *continued payment* of her  
19 long-term disability claim and benefits is relevant evidence for this Court to consider with  
20 regard to whether she is unable to work in any occupation and also illustrates the  
21 unreasonableness of Prudential's termination of her Life Insurance Waiver of Premium  
22 benefit.

23           23. The approval and continued payment of Ms. Pogue's long-term disability claim  
24 and monthly benefit is evidence that its termination of her Life Insurance Waiver of Premium  
25 benefit was motivated by Prudential's financial conflict of interest and its desire to save  
26 money and to reduce liability.

1           24.   Following the onset of her disability, Ms. Pogue filed a claim for the Life  
2 Insurance Waiver of Premium benefit under the relevant Policy, which was entirely  
3 administered and funded by Prudential.

4           25.   Prudential made every decision regarding whether Ms. Pogue met the  
5 definition of “Totally Disabled” as that term is defined in the relevant Policy.

6           26.   Upon information and belief, the relevant Policy’s definition of “Totally  
7 Disabled” governing Ms. Pogue’s Life Insurance Waiver of Premium claim is as follows:

8           “You are ‘Totally Disabled’ when, due to Sickness, Injury or both, you are not able to  
9 perform for wage or profit, the material and substantial duties of any job for which you  
are reasonably fitted by your education, training or experience.”

10          27.   In support of her Life Insurance Waiver of Premium claim, Ms. Pogue  
11 submitted to Prudential, compelling and reliable medical and other evidence that supported  
12 her allegation she met (and continues to meet) the aforementioned definition of “Totally  
13 Disabled” as defined in the relevant Policy.

14          28.   Prudential initially approved Ms. Pogue’s claim for the Life Insurance Waiver  
15 of Premium benefit and reinstated her group life insurance coverage from September 6, 2015  
16 through August 7, 2020, when Prudential terminated her claim and benefit after erroneously  
17 finding that she no longer met the definition of “Totally Disabled.”

18          29.   In a letter dated August 7, 2020, Prudential informed Ms. Pogue that it was  
19 terminating her Life Insurance Waiver of Premium claim/benefit beyond that same date after  
20 concluding that, “we have determined that you are no longer eligible for this benefit.”

21          30.   Pursuant to 29 U.S.C. § 1133, Ms. Pogue timely appealed Prudential’s August  
22 7, 2020 termination of her Life Insurance Waiver of Premium claim/benefit on February 1,  
23 2022.

24          31.   In support of her Life Insurance Waiver of Premium claim and appeal of the  
25 termination of her benefits, Ms. Pogue submitted a September 2, 2021 Prudential Attending  
26

Physician's Statement completed by her board-certified treating primary care physician of over 14 years, who has steadfastly and consistently informed Prudential that Ms. Pogue is disabled and has been unable to work in any occupation since she became disabled in 2014.

32. In completing his September 2, 2021 Prudential Attending Physician's Statement, Ms. Pogue's board-certified physician answered "none" when asked to comment on the job category that best described Ms. Pogue's functional activities and ability to work.

33. On the same Attending Physician's Statement, the physician answered, "no plan to return..." when asked to comment on Ms. Pogue's "Return to Work Effort."

34. Ms. Pogue also submitted to Prudential a February 1, 2022 Checklist Letter completed by the same board-certified physician, who answered "yes" when asked to confirm whether it was his medical opinion that Ms. Pogue meets the definition of "Totally Disabled" set forth in the Prudential Policy.

35. In support of her appeal, Ms. Pogue also submitted a June 12, 2020 Prudential Capacity Questionnaire completed by the same board-certified physician, who answered "No" when asked if Ms. Pogue is capable of full-time work capacity.

36. Ms. Pogue's board-certified physician confirmed in the Prudential Capacity Questionnaire that his work restrictions and opinions regarding Ms. Pogue's total disability are "permanent" because she has reached maximum expected improvement.

37. In support of her appeal, Ms. Pogue also re-submitted a September 28, 2015 narrative letter authored by the same board-certified physician, who confirmed, "I believe Miss Pogue is precluded from work in any environment..."

38. Ms. Pogue also re-submitted to Prudential an August 11, 2016 narrative letter authored by the same board-certified physician, who opined in the letter that, "it remains my medical opinion that Ms. Pogue has been unable to work in any occupation since December 2014...this opinion will remain in place indefinitely."

1           39. In support of her appeal and claim, Ms. Pogue also submitted her February 1,  
2 2022 sworn affidavit wherein she confirmed that she remains unable to work in any  
3 occupation and her disabling medical conditions have not improved in any manner that allow  
4 her to return to any work since she last worked on December 6, 2014.

5           40. For her appeal, Ms. Pogue also submitted updated medical records from her  
6 treating medical professionals that all confirm she remains “Totally Disabled” as the term is  
7 defined in the Policy, and that her disabling medical conditions have not improved in any  
8 manner that allow her to return to any work since her disability began.

9           41. For her appeal, Ms. Pogue also submitted a list of her current medications,  
10 along with the adverse side effects/limitations they create for her and the reasons those side  
11 effects also preclude her from being able to work in any occupation.

12           42. All of the reliable evidence Ms. Pogue submitted to Prudential consistently  
13 proves that she is unable to work in *any occupation* and that she continues to meet the  
14 definition of “Totally Disabled” as set forth in the Policy.

15           43. In a December 22, 2016 letter (*See* Exhibit “B”), Prudential **instructed and**  
16 **required** Ms. Pogue to apply for Social Security disability benefits from the Social Security  
17 Administration (hereinafter referred to as the “SSA”).

18           44. Prudential informed Ms. Pogue in its December 22, 2016 letter that if she did  
19 not file a claim for SSA disability benefits, it would reduce her long-term disability benefit  
20 amount (and its liability to her) by an estimate of what her monthly SSA disability benefit  
21 amount may be.

22           45. Prudential’s requirement that Ms. Pogue file a claim for SSA disability  
23 benefits, when it knew she had to prove she was unable to work in *any occupation* by the SSA  
24 to qualify for those benefits, is probative and compelling evidence that Prudential believed  
25 Ms. Pogue also met SSA’s definition of disability and that she was unable to work in any  
26 occupation that may exist within the national economy.

1           46.     The fact that Prudential believed Ms. Pogue was disabled and unable to work  
2 in any occupation and was entitled to SSA disability benefits is documented by Prudential's  
3 statement in its December 22, 2016 letter that if Ms. Pogue did not apply for SSA disability  
4 benefits it would begin reducing her long-term disability benefit by the estimated amount of  
5 her monthly SSA disability benefit.

6           47.     On September 21, 2017, the SSA approved Ms. Pogue's SSA disability claim  
7 without it requiring her to attend a hearing before an Administrative Law Judge.

8           48.     After reviewing all Ms. Pogue's evidence (which Prudential also has in its  
9 possession as of the date of filing this Complaint), the SSA concluded that since December 5,  
10 2014 (her date of disability), she has been disabled and unable to work in any gainful  
11 occupation that exists within the national economy.

12           49.     Ms. Pogue is currently receiving SSA disability benefits and SSA has  
13 consistently found that she has been unable to work in *any occupation* since it agreed with  
14 her that she became disabled on December 5, 2014.

15           50.     The SSA's approval of Ms. Pogue's SSA claim is highly probative and relevant  
16 because it is evidence of an independent and unconflicted fact finder's decision.

17           51.     The SSA's approval of Ms. Pogue's SSA claim is highly probative and relevant  
18 evidence of Ms. Pogue's disability because SSA's definition of disability is similar, if not  
19 identical, to the definition of "Totally Disabled" set forth in Prudential's Policy.

20           52.     On September 27, 2017, Ms. Pogue informed Prudential her claim for SSA  
21 disability benefits was approved and she submitted a complete copy of the SSA's September  
22 21, 2017 decision which found she became disabled on December 5, 2014, the date she last  
23 worked and the date she told Prudential that she became disabled.

24           53.     On February 1, 2022, as part of her appeal and in support of her Life Insurance  
25 Waiver of Premium claim, Ms. Pogue reminded Prudential that her SSA disability claim was  
26 approved by SSA based on the compelling nature and persuasiveness of her evidence alone



1 and without the agency requiring or needing her to to attend and testify at a hearing before an  
2 Administrative Law Judge.

3 54. To afford Prudential a full opportunity to review all of Ms. Pogue's evidence  
4 that SSA considered in her SSA claim, she again submitted the SSA's September 21, 2017  
5 decision approving her claim along with a complete copy of her SSA disability claim file.

6 55. The substantive evidence supporting Ms. Pogue's SSA disability claim and  
7 SSA's finding that she is disabled *based solely on her evidence*, the same evidence Prudential  
8 was in possession of after she appealed the denial of her Life Insurance Waiver of Premium  
9 claim on February 1, 2022, is highly relevant and compelling evidence which not only proves  
10 that she meets the definition of disability in Prudential's Policy but also the unreasonableness  
11 and unlawfulness of Prudential's termination of her claim and benefits.

12 56. As referenced above, Ms. Pogue filed her appeal on February 1, 2022 and  
13 through the date of filing this Complaint, Prudential has not made a decision on her appeal  
14 even though ERISA required Prudential to render a decision within 45 days of its receipt of  
15 her appeal.

16 57. Prudential's failure to render any decision in Ms. Pogue's claim through the  
17 date of filing this Complaint, which is now more than five (5) months after the claim was  
18 appealed on February 1, 2022, is evidence of its failure to comply with ERISA as well as the  
19 unlawfulness and unreasonableness of its claims administration process.

20 58. Prudential's failure to render any decision in Ms. Pogue's appeal and claim is  
21 evidence that it failed to act as her ERISA fiduciary and failed to afford her with the "full and  
22 fair" review required by ERISA.

23 59. Prudential's failure to render any decision in Ms. Pogue's claim through the  
24 date of this Complaint, now more than five (5) months after the date her appeal was filed on  
25 February 1, 2022, violates ERISA's requirement that it provide a "full and fair" review.  
26

1           60. Prudential's failure to review Ms. Pogue's claim within the required ERISA  
2 timeframe referenced above following its receipt and review of the SSA's favorable decision  
3 is clear evidence that it did not act as her ERISA fiduciary which required it to administer the  
4 claim "solely in her best interests."

5           61. All of the reliable evidence Ms. Pogue submitted to Prudential consistently and  
6 conclusively proves she is unable to work in *any occupation* and that she has consistently met  
7 and continues to meet the definition of "Totally Disabled" set forth in Prudential's Policy  
8 since she last worked on December 6, 2014.

9           62. In two (2) separate letters dated February 1, 2022 and February 4, 2022, Ms.  
10 Pogue requested for Prudential to engage her in a "meaningful dialogue" during its review as  
11 required by Ninth Circuit law so she had an opportunity to cure any alleged deficiencies  
12 Prudential believed may have existed with the evidence she submitted in her appeal.

13           63. Ms. Pogue sent the above letters to Prudential so it would afford her with the  
14 ability to perfect her claim as required by *Salomaa v. Honda Long Term Disability Plan*, 637  
15 F.3d 958, 972 (9th Cir. 2011) and *Montour v. Hartford Life & Accident Inc. Co.*, 588 F.3d  
16 623 (9th Cir. 2009).

17           64. Prudential failed to engage in a good faith "meaningful dialogue" with Ms.  
18 Pogue during its review because prior to the filing of this Complaint, it failed to inform her  
19 what evidence was necessary so she could cure any alleged deficiencies Prudential believed  
20 existed in her claim so it could be approved.

21           65. In a letter dated February 8, 2022 (*See Exhibit "C"*), Prudential confirmed its  
22 receipt of Ms. Pogue's February 1, 2022 appeal and that "[it is] performing a thorough  
23 evaluation based on the information currently in file."

24           66. As part of its review of Ms. Pogue's claim, Prudential obtained a medical  
25 records only "paper review" dated February 21, 2022 from a medical doctor of its choosing,  
26 named Kevin Kohan, D.O.

1           67. In a letter dated March 16, 2022, Prudential provided Ms. Pogue with a copy  
2 of the medical records only “paper review” and the opportunity for her and her treating board-  
3 certified physician to respond, if they desired.

4           68. In its March 16, 2022 letter, Prudential did not give Ms. Pogue any information  
5 on what needed to be addressed or what it thought was an issue that needed to be responded  
6 to in Dr. Kohan’s report. This is only one example of Prudential’s failure to engage Ms.  
7 Pogue in a “meaningful dialogue.”

8           69. Ms. Pogue alleges that in her claim, as well as in other disability/Life Insurance  
9 Waiver of Premium claims Dr. Kohan reviews, based on the opinion he rendered in Ms.  
10 Pogue’s claim, specifically that she was able to work with the restrictions and limitations he  
11 set forth in his report, Dr. Kohan operated under a conflict of interest because he is a long-  
12 time medical consultant for Prudential and/or for the disability insurance industry.

13           70. Dr. Kohan’s bias is evident in that although he stated Ms. Pogue was able to  
14 work in any occupation, he did not understand, realize or simply ignored the fact that his work  
15 restrictions and limitations for Ms. Pogue actually did not allow her to perform any work  
16 which exists within the national economy.

17           71. Prudential also failed to realize or also ignored that Dr. Kohan’s work  
18 restrictions and limitations did not allow Ms. Pogue to perform any work.

19           72. Prudential’s failure to fully, adequately and properly investigate and evaluate  
20 Dr. Kohan’s work restrictions and limitations and the vocational issues in Ms. Pogue’s claim  
21 violates its duty to provide a “full and fair” review under ERISA.

22           73. As a result of Dr. Kohan’s longtime relationship with Prudential and the  
23 disability insurance industry, Ms. Pogue alleges that based on the opinions he rendered in her  
24 claim (that she was able to work with the restrictions and limitations he set forth), Dr. Kohan  
25 was biased, and not impartial or independent as Prudential informed her was.  
26

1           74. Due to his long-time relationship with Prudential and the disability insurance  
2 industry, Dr. Kohan operated under a conflict of interest and may have had incentives to  
3 protect his own consulting relationship with Prudential and the disability insurance industry  
4 by providing biased medical records only “paper reviews,” which selectively review and  
5 ignored evidence as he did in Ms. Pogue’s claim.

6           75. Dr. Kohan’s conflict of interest and bias led him to render conclusory (i.e. she  
7 was able to work when his work restrictions and limitations did not allow her to) biased,  
8 unreasonable, implausible and adverse opinions to Ms. Pogue and her claim while using those  
9 same conclusory opinions which favored Prudential.

10          76. In *Black and Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003), the  
11 Supreme Court warned about biased, conflicted insurance companies such as Prudential  
12 using doctors like Dr. Kohan, who are repeatedly retained by noting, “Nor do we question  
13 the Court of Appeals’ concern that physicians retained by benefits plans may have an  
14 ‘incentive to make a finding of not disabled’ in order to save their employers money and  
15 to preserve their own consulting arrangements.”

16          77. In a three (3) page letter dated April 25, 2022, Ms. Pogue responded to  
17 Prudential’s March 16, 2022 letter and Dr. Kohan’s report, detailing the numerous reasons  
18 she is unable to work in any occupation and the medical opinions that support this conclusion.

19          78. With her April 25, 2022 letter, Ms. Pogue submitted to Prudential an April 20,  
20 2022 narrative letter and response from her long-time treating board-certified physician who  
21 completed the medical questionnaires referenced above (paras. 32-38).

22          79. In his April 20, 2022 response letter, Ms. Pogue’s physician responded to Dr.  
23 Kohan’s opinions by stating, “I completely disagree with Dr. Kohan’s report...For [Ms.  
24 Pogue] to physically attempt what he says she can do, poses a serious risk to her health, her  
25 well-being and in my opinion is irresponsible.”  
26

1           80. In her April 25, 2022 letter, Ms. Pogue informed Prudential that it should, “do  
2 the right thing and comply with federal law by acting as her ERISA fiduciary by finding she  
3 continues to be totally disabled and unable to work in any occupation as she has been for  
4 almost 6 years now.”

5           81. On April 29, 2022, Ms. Pogue submitted to Prudential her April 29, 2022  
6 affidavit responding to Dr. Kohan’s review of her claim and confirmed, “In my opinion it  
7 would be completely dishonest for Prudential to rely on Dr. Kohan’s opinions over my long-  
8 time treating doctor...who is board-certified. He knows me better than any doctor and is the  
9 most qualified doctor to state (and he has accurately stated over many years) what I am able  
10 and not able to do either at work or at home.”

11           82. In her April 29, 2022 letter, Ms. Pogue again asked for Prudential to act as her  
12 ERISA fiduciary and reinstate her life insurance coverage and Life Insurance Waiver of  
13 Premium claim/benefit.

14           83. In a letter dated May 20, 2022, Prudential provided Ms. Pogue with a copy of  
15 a May 5, 2022 Addendum completed by Dr. Kohan and the opportunity to respond to it, if  
16 she desired.

17           84. In a letter dated June 15, 2022, Ms. Pogue submitted to Prudential a June 7,  
18 2022 response to Dr. Kohan’s Addendum authored by a vocational expert she retained who  
19 has 35 years of experience in the vocational industry, David Janus, MA, CDMS, CRC.

20           85. After reviewing Dr. Kohan’s opinions and limitations, Ms. Pogue’s vocational  
21 expert, Mr. Janus (who has testified as a vocational expert in over 9,000 SSA Administrative  
22 Law Judge hearings), confirmed in his June 7, 2022 response that, “Given the May 5, 2022  
23 amended restrictions and limitations from Dr. Kohan, *Ms. Pogue is precluded* from  
24 performing... all occupations that exist in the national economy.” (emphasis added).

25           86. On July 8, 2022 (*See* Exhibit “C”), when Prudential still had not made a  
26 decision on her appeal, Ms. Pogue advised it that, “according to our calculations, per ERISA’s

1 regulations on your company's timeframe to render a decision on the appeal, Prudential's 90<sup>th</sup>  
2 day to do that is July 15, 2022. This date was calculated based on Ms. Pogue's February 2,  
3 2022 appeal and submission of evidence, and the time the claim was tolled due to Prudential  
4 requesting information from Ms. Pogue during the appeal."

5 87. In her July 8, 2022 letter, Ms. Pogue informed Prudential she expected it to,  
6 "...comply with ERISA and to fulfill its fiduciary duty to her by rendering a decision in her  
7 claim no later than July 15, 2022."

8 88. As of the date of filing this Complaint, Prudential has not responded to Ms.  
9 Pogue's July 8, 2022 letter.

10 89. Prudential's failure to respond to Ms. Pogue's July 8, 2022 letter is evidence of  
11 its failure to act as her fiduciary, failure to investigate the claim and failure to engage Ms.  
12 Pogue in the "meaningful dialogue" required by ERISA and Ninth Circuit law.

13 90. As of the date of filing this Complaint, it has been forty (40) days since  
14 Prudential's last correspondence to Ms. Pogue, which was a letter dated June 10, 2022.

15 91. As of the date of filing this Complaint, it has been one hundred and sixty-two  
16 (162) days, including the days that were tolled during the review for Ms. Pogue to submit her  
17 evidence, since Prudential confirmed it was reviewing her appeal on February 8, 2022.

18 92. Prior to filing this Complaint, Prudential has not made a decision in Ms.  
19 Pogue's appeal, even though the mandatory timeframe for rendering one expired on July 15,  
20 2022 (90 days from the date Prudential confirmed receipt of Ms. Pogue's February 1, 2022  
21 appeal, excluding the days that were tolled during the review for Ms. Pogue to submit her  
22 evidence).

23 93. Prudential's failure to make any decision in Ms. Pogue's appeal violates not  
24 only ERISA, but also the express terms of its own Policy which states, "Prudential shall  
25 make a determination on your claim appeal within 45 days of the receipt of your appeal  
26 request. This period may be extended by up to an additional 45 days if Prudential

determines that special circumstances require an extension of time.” (*See* Exhibit “A,” page 68).

94. Due to Prudential’s failure to render a decision in Ms. Pogue’s appeal and failure to provide a reasonable claims process or a “full and fair” review as required by ERISA, with the filing of this Complaint, Ms. Pogue deems her claim and appeal to be exhausted pursuant to 29 C.F.R. § 2560.503-1(i)(1)(i) and (i)(3)(i).

95. The standard of review in this matter is *de novo* because at the time Ms. Pogue filed this Complaint, due to Prudential’s failure to provide a reasonable claims process in not making any decision in her appeal, she has exhausted all of her administrative remedies and is permitted to file this civil action.<sup>1</sup>

96. In evaluating Ms. Pogue’s claim on appeal, Prudential owed her an ERISA fiduciary duty and was obligated under ERISA to administer her claim, “solely in [her] best interests...”

97. If Prudential had acted as Ms. Pogue’s ERISA fiduciary and administered the claim “solely” in her best interests by properly crediting her reliable medical, vocational and other evidence, it would have timely approved her appeal and reinstated her Life Insurance Waiver of Premium claim.

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<sup>1</sup> *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 972 (9th Cir. 2006) held, “In general, we review *de novo* a claim for benefits when an administrator fails to exercise discretion. *See Jebian*, 349 F.3d at 1106 (holding that an administrator failed to exercise its discretion when it did not make a benefits decision within the 60 days specified by the terms of the plan and the applicable regulation, so that the ultimate decision rendered was “undeserving of deference”). Other circuits have also held that review is *de novo* when the plan administrator fails to exercise discretion. *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 109 (2d Cir. 2005)(holding that a “deemed denied” claim, in which the administrator did not issue a decision within the time required by the regulations, constituted “inaction,” which was not an exercise of discretion and which therefore was entitled to no deference; *de novo* review applied); *Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625, 632 (10th Cir. 2003) (noting that “[d]eference to the administrator’s expertise is inapplicable where the administrator has failed to apply his expertise to a particular decision”); *Gritzer v. CBS, Inc.*, 275 F.3d 291, 296 (3d Cir. 2002) (“Where a trustee fails to act or to exercise his or her discretion, *de novo* review is appropriate because the trustee has forfeited the privilege to apply his or her discretion . . .”). *See Fessenden v. Reliance Standard Life Ins. Co.*, 927 F.3d 998 (7th Cir. June 25, 2019).



1        98. Due to its aforementioned financial and other conflicts of interest, Prudential's  
 2 review is evidence that its dual roles and conflicted financial decision making led it to  
 3 administer Ms. Pogue's claim solely in *Prudential's best interests* and not in hers.

4        99. Prudential's conflict of interest as the decision-maker and provider/payor of life  
 5 insurance benefits precluded it from administering Ms. Pogue's claim in her best interests as  
 6 an unconflicted reviewer would have. <sup>2</sup>

7        100. Prudential's conflict of interest is apparent and obvious given the fact that it  
 8 failed to approve Ms. Pogue's claim after it received Mr. Janus' (her vocational expert) report  
 9 on June 15, 2022, who informed Prudential why she was "Totally Disabled" based solely on  
 10 Dr. Kohan's work restrictions and limitations which are set forth in his report.

11        101. Prudential's failure to make any decision in Ms. Pogue's appeal and failure to  
 12 engage her in a "meaningful dialogue" during its review is evidence that its conflicted and  
 13 biased review was motivated by its financial conflict of interest as referenced herein.

14        102. Ms. Pogue alleges that Prudential's review was neither full nor fair because it  
 15 violated ERISA, specifically, 29 U.S.C. § 2560.503-1, for many reasons including, but not  
 16 limited to: failing to make any decision as required by ERISA in Ms. Pogue's appeal;  
 17 failing to comply with the terms of its own Policy regarding when Prudential was required  
 18 to make a decision; by failing to accept the opinions and work limitations of its own  
 19 reviewer, Dr. Kohan, which do not allow Ms. Pogue to work in any occupation; by failing  
 20 to credit Ms. Pogue's treating physician's responses to Dr. Kohan's report, which proved  
 21 she is unable to work in any occupation; by failing to credit Ms. Pogue's own affidavit, her

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22 <sup>2</sup> It sets forth a special standard of care upon a plan administrator, namely, that the  
 23 administrator "discharge [its] duties" in respect to discretionary claims processing "solely  
 24 in the interests of the participants and beneficiaries" of the plan, § 1104(a)(1); it  
 25 simultaneously underscores the particular importance of accurate claims processing by  
 26 insisting that administrators "provide a 'full and fair review' of claim denials," Firestone,  
 489 U.S., at 113, 109 S. Ct. 948, 103 L. Ed. 2d 80 (quoting § 1133(2)); and it supplements  
 marketplace and regulatory controls with judicial review of individual claim denials, see §  
 1132(a)(1)(B). *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2350 (U.S. 2008).



1 statements regarding Dr. Kohan's report and that she remains unable to work in any  
2 occupation; by failing to credit and accept Ms. Pogue's vocational expert's report and his  
3 opinion that based on Dr. Kohan's work limitations, Ms. Pogue is disabled and not able to  
4 work in any occupation; failing to credit Ms. Pogue's credible, reliable evidence including  
5 not considering, evaluating and giving any weight to the SSA's approval of her SSA claim or  
6 the rationale for why SSA's approved her claim based solely on her medical records; by  
7 failing to retain a truly independent third party vendor to obtain medical records reviews in  
8 Ms. Pogue's claim; by failing to have Ms. Pogue's claim reviewed by truly independent  
9 medical professionals; by failing to have Ms. Pogue's claim reviewed by a vocational expert  
10 who considered all the evidence in her appeal including the fact that Dr. Kohan's work  
11 limitations did not allow her to perform any work; by abdicating and outsourcing its ERISA  
12 fiduciary duty and retaining biased companies and medical professionals to be involved in the  
13 review of Ms. Pogue's claim; by failing to fully, properly, fairly and adequately investigate  
14 Ms. Pogue's claim; by failing to request for Ms. Pogue to attend an Independent Medical  
15 Examination when the Policy allowed for one and Ms. Pogue's disabling medical conditions,  
16 her subjective complaints and work limitations were most accurately understood by having  
17 her undergo an in person examination by a medical professional of its own choosing; by not  
18 having a vocational report/evaluation from its own vocational expert to assess whether Ms.  
19 Pogue was disabled based on Dr. Kohan's report and opinions; by de-emphasizing her  
20 medical and other evidence which supported Ms. Pogue's claim and its approval; by  
21 disregarding and/or failing to consider Ms. Pogue's disabling subjective and self-reported  
22 complaints/symptoms/limitations; by failing to consider the side effects from Ms. Pogue's  
23 medications that preclude her from working in any occupation; by failing to consider the  
24 combined effect that all of her medical conditions and resulting limitations documented in her  
25 medical, vocational and lay-witness evidence had on her ability to work in any occupation;  
26 and by failing to engage Ms. Pogue in a "meaningful dialogue" so she and her treating and/or

1 evaluating medical professionals could *adequately* respond to the issues that Prudential  
2 believed existed in her claim as a result of Dr. Kohan's report so her claim could be approved.

3 103. Prudential's ERISA violations include but are not limited to, completely failing  
4 to credit, reference, consider, and/or selectively reviewing and de-emphasizing most, if not  
5 all of Ms. Pogue's reliable evidence which proved she met and continues to meet the  
6 definition of "Totally Disabled" in the Policy and this evidence should have allowed  
7 Prudential to render a timely approval of her claim.

8 104. Ms. Pogue alleges a reason Prudential provided an unlawful review which was  
9 neither full nor fair and that violated ERISA, specifically, 29 U.S.C. § 2560.503-1, is due to  
10 its financial conflict of interest which manifested as a result of the dual roles Prudential  
11 undertook as the decision maker and the provide/payor of benefits in her claim.

12 105. Prudential's conflict of interest provided it with a financial incentive to  
13 terminate Ms. Pogue's Life Insurance Waiver of Premium claim, because every dollar it saved  
14 in not continuing to waive premiums on Ms. Pogue's life insurance and not having to pay a  
15 potential life insurance claim, now represents profit for Prudential.

16 106. Prudential's self-serving actions are similar to the conflicted and unlawful  
17 review by another disability insurance company where the Ninth Circuit criticized it by  
18 stating, "The plan with a conflict of interests also has a financial incentive to cheat."  
19 *Salomaa v. Honda Long Term Disability Plan*, 637 F.3d 958, 970 (9<sup>th</sup> Cir. 2011).

20 107. Prudential's financial conflict of interest manifested when it initially  
21 terminated Ms. Pogue's claim and then it failed to render any decision on her appeal. In  
22 searching for reasons to deny Ms. Pogue's claim rather than approving it, Prudential saved a  
23 *significant amount of money* in unpaid benefits to her.

24 108. With regard to whether Ms. Pogue meets the definition of "Totally Disabled"  
25 set forth in the relevant Policy and/or Plan, as stated above, the standard of review is *de novo*,  
26 because at the time she filed this Complaint, due to Prudential's failure to provide her with

1 a reasonable claims process and failure to render a decision on her appeal, Ms. Pogue  
2 deems her claim exhausted pursuant to 29 C.F.R. § 2560.503-1(i)(1)(i) and (i)(3)(i).

3 109. In the event the court finds the Policy lawfully confers discretion, Ms. Pogue  
4 asserts the standard of review should be *de novo* because Prudential did not provide a “full  
5 and fair” review as required by ERISA, and its ERISA violations are so flagrant and egregious  
6 they justify *de novo* review under Ninth Circuit law

7 110. Ms. Pogue alleges that Prudential failed to provide a “full and fair” review as  
8 required by ERISA, and that its termination of her Life Insurance Waiver of Premium benefits  
9 beyond August 7, 2020 is a *de novo* wrong decision because her evidence proves that she did  
10 meet and continues to meet the definition of “Totally Disabled” set forth in the Policy.

11 111. Regardless of the standard of review, the Court should allow discovery so it  
12 may properly weigh and consider the nature, extent and effect that *any* conflict of interest  
13 and/or any ERISA procedural violation had in influencing Prudential’s initial decision to  
14 terminate Ms. Pogue’s Life Insurance Waiver of Premium claim, as well as its failure to  
15 render any decision in the appeal of the termination of her claim.

16 112. Regardless of the standard of review, Ms. Pogue is entitled to discovery  
17 regarding Prudential’s conflicts of interest/bias, the conflicts of interest/bias of any third-party  
18 vendors Prudential may have retained and the conflicts of interest/bias of any individual who  
19 were involved in the review of Ms. Pogue’s claim and who may have influenced and led to  
20 Prudential’s failure to provide a reasonable claims process and to make a decision in Ms.  
21 Pogue’s claim.

22 113. Ms. Pogue asserts that any third-party vendor retained by Prudential, and in  
23 turn, any medical professional that vendor hired to review evidence in Ms. Pogue’s claim,  
24 operated under a conflict of interest due to their business relationship with Prudential and their  
25 relationship with the disability insurance industry in general.  
26

1        114. Regardless of the standard of review, Ms. Pogue is entitled to discovery  
2 regarding Prudential's compliance with the terms of its Policy, as well as the numerous  
3 ERISA procedural violations committed by Prudential during Ms. Pogue's appeal.

4        115. As a direct result of Prudential's decision to terminate Ms. Pogue's Life  
5 Insurance Waiver of Premium benefit, as well as its failure to make a decision in her appeal,  
6 she has been injured and suffered damages in the form of lost Life Insurance Waiver of  
7 Premium benefits and continued life insurance coverage for herself and her  
8 family/dependents from Prudential, in addition to other potential non-disability employee  
9 benefits she may be entitled to receive through or from the Plan, as well as from any other  
10 Company Plan and/or the Company as a result of being found disabled in this matter.

11        116. Upon information and belief, Ms. Pogue alleges other potential non-disability  
12 employee benefits may include, but are not limited to, health insurance benefits/coverage,  
13 other insurance related coverage/benefits, retirement benefits and/or a pension.

14        117. Ms. Pogue seeks any and all employee benefits she is due and owed, including  
15 but not limited to the reinstatement of the life insurance coverage for herself and her  
16 family/dependents before Prudential erroneously terminated her claim. Ms. Pogue also seeks  
17 the waiver of any premiums that may be due on the aforementioned life insurance coverage,  
18 and any other benefit she may be entitled to and due from any Defendant as a result of being  
19 found disabled and prevailing in this matter.

20        118. Ms. Pogue does not seek long-term disability benefits from Prudential as that  
21 claim has been approved and she is currently receiving those benefits from Prudential.

22        119. Pursuant to 29 U.S.C. § 1132, Ms. Pogue is entitled to the reinstatement of  
23 her life insurance coverage for herself and her family/dependents and the reinstatement of  
24 her Life Insurance Waiver of Premium benefit, as well as any other non-disability  
25 employee benefits she may be entitled to, including prejudgment interest, reasonable  
26 attorney's fees and costs from Defendant.

1       120.     Ms. Pogue is entitled to prejudgment interest at the legal rate pursuant to A.R.S.  
2     §20-462, or at such other rate as is appropriate to compensate her for the losses she has  
3     incurred as a result of Prudential's termination and nonpayment of benefits.

4       WHEREFORE, Ms. Pogue prays for judgment as follows:

5       A.     For an Order finding the evidence in Ms. Pogue's claim is sufficient to prove  
6     that she met and continues to meet the definition of "Totally Disabled" set forth in the  
7     relevant Plan and/or Policy, and that she is entitled to life insurance coverage and Life  
8     Insurance Waiver of Premium benefits provided by the Policy, and any other employee  
9     benefits she is entitled to as a result of that Order, from the date Prudential terminated her  
10    benefits, through the date of judgment with prejudgment interest thereon;

11      B.     For an Order directing Defendants to continue providing Ms. Pogue the  
12    aforementioned life insurance coverage and the waiver of any premiums that may be due on  
13    that life insurance, along with any other employee benefits until such a time as she meets the  
14    conditions for the termination of benefits;

15      C.     In the event the Court is unable to render a decision in Ms. Pogue's claim  
16    regarding any issue, she seeks an Order remanding her claim and this case to Prudential so it  
17    can review the claim again in a manner consistent with the Court's Order;

18      D.     For an Order awarding Ms. Pogue her attorney's fees and costs incurred as a  
19    result of prosecuting this suit pursuant to 29 U.S.C. §1132(g); and

20      E.     For such other and further relief, equitable and otherwise, as the Court deems  
21    just, proper, and appropriate.

22                               DATED this 20<sup>th</sup> day of July, 2022.

23                               SCOTT E. DAVIS. P.C.

24                               By: /s/ Scott E. Davis  
25                                       Scott E. Davis  
26                                       Attorney for Plaintiff